

No. 13-20-00261-CV

In The Court Of Appeals FILED IN
Thirteenth District Of Texas At Corpus Christi 13th COURT OF APPEALS
CORPUS CHRISTI/EDINBURG, TEXAS
9/4/2020 9:05:03 AM
KATHY S. MILLS
Clerk

CERTAIN UNDERWRITERS AT LLOYD’S OF LONDON SUBSCRIBING TO
POLICY NO. NAJL05000016-H87, as Subrogee of Momentum Hospitality, Inc. &
75 and Sunny Hospitality d/b/a Fairfield Inn & Suites,
Plaintiff-Appellant

v.

MAYSE & ASSOCIATES, INC.,
Defendant-Appellee.

**Appellant Underwriters’ Response In Opposition To Appellee Mayse &
Associates’ Motion To Dismiss Underwriters’ Appeals**

Appellant, CERTAIN UNDERWRITERS AT LLOYD’S OF LONDON
SUBSCRIBING TO POLICY NO. NAJL05000016-H87 (“Underwriters”),
respectfully submits this Response in Opposition to Appellee Mayse & Associates’
 (“Mayse”) Motion to Dismiss Underwriters’ Appeals. For their Response,
Underwriters respond to each numbered allegation of Mayse’s Motion as follows.

1. Underwriters agree with this allegation by Mayse.
2. Underwriters agree with this allegation by Mayse.
3. For reasons explained below, Underwriters do not agree with this
allegation by Mayse. This Court has jurisdiction over the appeals (Cause Nos. 13-

20-00261-CV, 13-20-00375-CV and 13-20-00376-CV) Underwriters have filed concerning Mayse in this matter.

4. While Underwriters agree they did not file the Notice of Appeal regarding this particular appeal within 20 days of the underlying Order dismissing their claims against Mayse (it was filed 9 days late), they do not agree this requires their appeal be dismissed. As explained in Underwriters' pending Motion to Retroactively Extend Time to File Notice of Appeal (which Underwriters incorporate by reference herein):

A. Pursuant to Texas Rule of Appellate Procedure 26.3, an appellate court can extend the time for filing a Notice of Appeal if, within 15 days of the original filing deadline, i) a Notice of Appeal is filed with the trial court, and ii) a Motion to Extend Time is filed with the appellate court.

B. Underwriters satisfied the first Rule 26.3 requirement, as they filed their Notice of Appeal 9 days after the original filing deadline.

C. Pursuant to the Texas Supreme Court and this Court, Underwriters implicitly satisfied the second Rule 26.3 requirement by filing their Notice of Appeal within 15 days after the original filing deadline. *Verburgt v Dorner*, 959 S.W.2d 615, 617-618 (Tex. 1997); *Martinez v Navy Army Community Credit Union*, No. 13-19-00645-CV (Tex. Ct. App. - Corpus Christi-Edinburg 1/16/20)(2020 W.L. 241970).

D. Furthermore, as more fully detailed in Underwriters' Motion to Retroactively Extend Time to File Notice of Appeal, Underwriters have a reasonable explanation for the late filing of their Notice of Appeal.

E. Therefore, Underwriters respectfully submit all the prerequisites for this Court to extend the deadline for Underwriters to file their Notice of Appeal by 9 days have been met, and if this Court does so then this appeal should not be dismissed.

5. Underwriters agree with this allegation by Mayse.

6. Underwriters agree with this allegation by Mayse. For the record, this Court has assigned three docket numbers to that second appeal. Cause Nos. 13-20-00375-CV and 13-20-03076-CV pertain to the two August 24, 2020 trial court Orders pertaining to Mayse, while Cause No. 13-20-00377-CV pertains to the August 24, 2020 Order regarding a different Defendant (DCI).

7. Underwriters agree with this allegation by Mayse.

8. Underwriters agree with this allegation by Mayse.

9. Underwriters agree with this allegation by Mayse.

10. As explained above in Paragraph 4, Underwriters do not agree with this allegation by Mayse.

11. Underwriters agree with this allegation by Mayse.

12. Underwriters agree with this allegation by Mayse.

13. While Underwriters agree they did not file the Notice of Appeal regarding this particular appeal within 20 days of the June 11, 2020 Order, as explained above in Paragraph 4 they do not agree this requires their appeal be dismissed.

14. Underwriters do not agree with this allegation by Mayse. Texas Rule of Appellate Procedure 29.6(a) provides:

While an appeal from an interlocutory order is pending, on a party's own motion or on the appellate court's own initiative, the appellate court may review the following:

- (1) a further appealable interlocutory order concerning the same subject matter; and
- (2) any interlocutory order that interferes with or impairs the effectiveness of the relief sought or that may be granted on appeal.

Accordingly, Underwriters submit the following:

A. The two August 24, 2020 Orders regarding Mayse that are the subject of Underwriters' second appeal (Cause Nos. 13-20-00375-CV and 13-20-03076-CV) concern the same subject matter as the original (immediately appealable) June 11, 2020 Order dismissing Mayse from this litigation. One is an Order denying Underwriters' Motion for New Trial/Reconsideration of that June 11, 2020 Order. The other is an Order striking an expert's Supplemental Affidavit that was part of Underwriters' Motion for New Trial/Reconsideration. Indeed, as both involve (directly or indirectly) *Tex.*

Civ. Prac. & Rem. Code. §150.002, both are immediately appealable as well. Taken as a whole, this qualifies as a basis for reviewing these two subsequent orders under Rule 29.6(a)(1).

B. Underwriters' counsel had considered filing a Rule 29.6 motion in this appeal regarding these two August 24 orders, along with commencing its second appeal solely regarding the August 24 dismissal of a different Defendant (DCI). However, that would still require Underwriters to then file a Motion to Consolidate the appeals with this Court (such a Motion is now on file in Cause No. 13-20-00377-CV¹), as at the end of the day it makes the most sense for the related appeals from all these lower court orders to be decided in a single appellate proceeding, with one unified briefing schedule and one oral argument. As such, Underwriters' counsel decided to save this Court from having to consider one extra motion, and simply include these two subsequent Mayse-related orders, along with the one DCI-related order, in a second appeal which would then be consolidated with the first.

C. Nevertheless, if this Court wants Underwriters to file such a Rule 29.6 Motion, Underwriters will be happy to do so.

¹ After filing that Motion to Consolidate in Cause No. 13-20-00377-CV, Underwriters learned this Court has actually assigned three different docket numbers to their second appeal -- Cause Nos. 13-20-00375-CV, 13-20-03076-CV and 13-20-00377-CV. Obviously, Underwriters' request for consolidation also applies to Cause Nos. 13-20-00375-CV and 13-20-03076-CV as well.

15. As explained above in Paragraph 14, Underwriters do not agree with this allegation by Mayse. Furthermore, Underwriters note that in Paragraphs 14 and 15 of Mayse's Motion, Mayse has conceded that even if all current appeals regarding it are dismissed, that will not end potential appellate review of Mayse-related Orders issued by the lower court. Whenever a final judgment is entered below, Underwriters will then be able to appeal August 24, 2020 denial of their New Trial/Reconsideration Motion, as well as the August 24, 2020 Order striking the supplemental affidavit which was part of the New Trial/Reconsideration Motion. So, in essence, whether now or later, Underwriters will be able to seek appellate review of the dismissal of Mayse from this litigation. Underwriters respectfully submit it makes far more sense for that to happen now, and all Orders pertaining to Mayse's dismissal from this action be subject to immediate appellate review.

16. Underwriters agree with this allegation by Mayse.

As established above, there is no reason to dismiss Underwriters' appeals vis-à-vis Mayse (Cause Nos. 13-20-00261-CV, 13-20-00375-CV and 13-20-03076-CV) at this time. Furthermore, there is absolutely no basis for dismissing Underwriters' appeal vis-à-vis DCI (Cause 13-20-00377-CV).

WHEREFORE, Plaintiff-Appellant Underwriters respectfully request that Appellee Mayse's Motion to Dismiss be denied.

Respectfully submitted,

DENENBERG TUFFLEY

/s/ Paul B. Hines

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H87, as Subrogee of Momentum Hospitality,
Inc. & 75 and Sunny Hospitality d/b/a
Fairfield Inn & Suites*

CERTIFICATION OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served on the attorneys of record of all parties to the above cause via Texas Court's e-filing system, which sends notice to counsel of record on the 4th day of September, 2020.

/s/ Davette R. Seldon
Davette R. Seldon

Automated Certificate of eService

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Associated Case Party: Certain Underwriters at Lloyd's of London Subscribing to Policy No. NAJL05000016

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